No. 76-1767

In the Supreme Court of the United States

OCTOBER TERM, 1977

NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The initial opinion and findings of fact and conclusions of law of the district court are reported at 389 F. Supp. 1193. The opinion of the district court following this Court's remand for further consideration in light of *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, is reported at 404 F. Supp. 457. The opinion of the court of appeals affirming the decision of the dis-

trict court but modifying its decree in part (Pet. App. A-2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1977. The petition for a writ of certiorari was filed on June 10, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a comprehensive ban on competitive price bidding for engineering services promulgated and enforced by the National Society of Professional Engineers violates Section 1 of the Sherman Act.

2. Whether the judgment of the district court, enjoining the Society from taking actions or making statements that would have the effect of perpetuating its unlawful ban on competitive price bidding for engineering services, is consistent with the First Amendment.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. * * *

STATEMENT

In this civil antitrust suit by the United States, the district court initially found that petitioner, the National Society of Professional Engineers ("NSPE"), violated Section 1 of the Sherman Act by conspiring with its members and various state engineering societies to eliminate any form of competitive price bidding in the sale of engineering services. 389 F. Supp. 1193. While NSPE's direct appeal to this Court was pending, *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, was decided. The Court then vacated the district court's judgment in this case and remanded for further consideration in light of *Goldfarb*. 422 U.S. 1031. Upon such reconsideration, the district court reaffirmed its earlier findings and conclusions. 404 F. Supp. 457. The court of appeals affirmed (Pet. App. A-2 to A-13).

1. NSPE is an organization formed to promote the economic, professional and social interests of engineers (F. 3, 389 F. Supp. at 1202).[1] It is incorporated and has affiliated state societies and local chap-

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[1] "F." refers to the district court's findings of fact.

ters in every state and territory; a person who joins NSPE simultaneously joins the appropriate state society and local chapter (F. 11, 12, 389 F. Supp. at 1203).[2] NSPE has approximately 69,000 members, 55,000 of whom are registered under the laws of the several states (F. 2, *id.* at 1202).

Approximately 12,000 NSPE members are consulting engineers who provide services for a fee (F. 4, 19, *id.* at 1202, 1204).[3] Consulting engineers are employed by or operate engineering firms that vary in size from one-man firms to publicly held corporations which actively market and promote their services nationwide (F. 9, 18, 19, 20, *id.* at 1202, 1204).[4] The majority of consulting engineers are in practice in five broad areas of engineering (civil, mechanical, electrical, chemical, and mining), and may confine

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[2] The converse is also true; an engineer who joins a state society automatically becomes a member of NSPE (F. 12, *id.* at 1203).

[3] There are approximately 325,000 registered professional engineers in America; roughly half are consulting engineers (F. 7, *id.* at 1202).

[4] Although 60 percent of engineering firms employ fewer than five engineers (F. 6, *id.* at 1202), larger firms account for a substantial part of total engineering revenues. For example, in 1972 the 438 largest architectual-engineering design firms accounted for approximately $2.2 billion in fees (F. 17, *id.* at 1204). See also F. 21, *ibid.*

In addition, there are several large "design/construct" firms, which construct projects in addition to doing consulting engineering; the 62 largest design/construct firms in 1972 received contracts totalling $26 billion (F. 24, *id.* at 1205).

their practice to more specialized areas within these categories (F. 7, 389 F. Supp. at 1202).

Engineering services are vital to the study, design, and construction of all types of structures, and the sale of those services is a substantial and profitable business (F. 19, *id.* at 1204). Engineers, usually in conjunction with architects, work on projects worth many billions of dollars. Engineering fees alone amount to 5 percent to 6 percent of total construction costs, and architect-engineer fees annually total around $4.7 billion (F. 16, 17, *id.* at 1203-1204).

Since 1964 NSPE has had a Code of Ethics that establishes rules enforced by NSPE and its affiliated state societies (F. 26, 52, *id.* at 1205, 1210). A determination that an engineer has violated the Code not only can engender society sanctions, but generally is damaging to the engineer's professional standing (F. 52, 55, *id.* at 1210).

Section 11(c) of the Code of Ethics prohibits members from submitting any information, directly or indirectly, to the prospective client concerning the price of an engineering project until the client has selected an engineer or engineering organization for negotiation of a contract (F. 26, *id.* at 1205). The district court found that from July 1966 to July 1972, the ban applied to all services provided by an engineering firm (F. 28, *id.* at 1206), and after July 1972, it applied to all "professional services associated with the study, design and construction of real property improvements (public and private) * * *" (F. 56,

id. at 1216).[5] The sole exception to the ban is the provision in Section 11(c) that members may disclose "recommended fee schedules prepared by various engineering societies * * *" (F. 26, *id.* at 1205). In turn, deviations from the fees set forth in the state or local fee schedule violate Section 9(b) of the Code (F. 31, 32, 39, 40, 389 F. Supp. at 1206, 1207).[6]

If an engineer is requested to supply a price other than the state or local society's fee schedule prior to the start of negotiations, Section 11(c) requires that he "withdraw from consideration for the proposed work" (F. 26, 30, *id.* at 1205, 1206).[7] Thus, the prospective purchaser of engineering services must select one engineering firm with which to negotiate, solely on the basis of background and reputation and, except for the state or local society's recommended fee schedule, in ignorance of the cost of those services (J.A. 9930; F. 45, J.A. 9970).

NSPE has publicized and enforced the ban. It has distributed pamphlets to members and customers, published interpretations of the Code in the NSPE magazine, and made speeches supporting the ban (F. 30, 35, 36, 37, 42, 389 F. Supp. at 1206-1207, 1208; F. 21, 27, 28, 33, *id.* at 1204, 1205-1206). NSPE advised its members that adherence to the rule against competitive bidding would protect higher engineering fees (F. 35, *id.* at 1206).[8] It has emphasized to the engineer in private practice "that in the long run he reduces his own fee capability by bidding" (GX 213, J.A. 6300). One pamphlet noted that "[s]ome firms have already been forced out of business due to financial failure caused by competitive bidding" (GX 215, p. 3, J.A. 6304; F. 36, *id.* at 1207).

Enforcement efforts have been widespread. For example, in 1970, NSPE organized its members in a successful refusal to submit competitive bids to the Department of Defense (F. 46-51, *id.* at 1208-1210).[9]

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[5] This finding is contrary to petitioner's claim that the ban has been applied only to engineering "work which immediately affects public safety" (Pet. 10, 12).

[6] Section 9(b) provides (Pet. App. A-55; emphasis in original):

> Section 9—The Engineer will uphold the principle of appropriate and adequate compensation for those engaged in engineering work.
>
> * * * *
>
> b. *He will not undertake work at a fee or salary below the accepted standards of the profession in the area.*

[7] Section 11(c) prohibits engineers from both soliciting and submitting such price information (F. 30, *id.* at 1206).

[8] The accuracy of this advice is illustrated by the following example: In 1971, the Tri-State Airport Authority in Huntington, West Virginia, following the traditional method of hiring an engineering firm for services in extending a runway, was told in negotiation that the price would be $500,000. The Authority, believing that this price was excessive, then sought competitive bids from the five best qualified firms; three responded, and the Authority contracted the job for $300,000 (F. 56, 61, *id.* at 1210, 1211).

[9] The court of appeals summarized NSPE's efforts to frustrate the Department of Defense's experimental competitive bidding program as follows:

> * * * [P]requalified engineering firms were invited to submit two sealed envelopes separately containing a technical proposal and a non-binding price estimate. The technical proposals were to be opened and evaluated by a

NSPE has also coordinated and encouraged the efforts of its state societies to investigate and punish those who compete in price (389 F. Supp. at 1196). Although the disciplining of members for violations of Section 11(c) is primarily the responsibility of the state societies, NSPE has recommended enforcement procedures and assisted state societies in conducting their investigations (*id.* at 1196, F. 52-53, 56-69, *id.* at 1210-1212).[10]

NSPE is also a member of the Committee on Federal Procurement of A-E Services ("COFPAES"), a membership committee of national architectural and engineering societies formed around 1967 to promote the position of its member societies that the selection of architects and engineers by agencies of the federal

selection board on the basis of their technical competence. Then the envelopes containing the price estimates were to be opened and a determination made as to whether price considerations warranted a change in the ratings of the proposals. The test procedure was to be conducted for a period of only one year, and in only two military construction districts. Despite the relative sophistication of the purchaser, the extensive provision for consideration of factors other than price, and the limited nature of this experiment, the Society advised its members that the DOD test procedure was unethical and urged them not to submit price information. As a result, the Department of Defense was unable to obtain price proposals under the test procedure. [Pet. App. A-9 - A-10; see also F. 46-51, *id.* at 1208-1210]

[10] After the Tri-State Airport Authority successfully obtained competitive bids which reduced engineering fees from $500,000 to $300,000 (see n. 8, *supra*), NSPE held an investigation of the incident in coordination with several state societies (F. 62-69, *id.* at 1211-1212).

government should be made without competitive bidding or other forms of price competition (F. 43, 389 F. Supp. at 1208).[11] During the period from the formation of COFPAES to at least October 1971, all COFPAES member societies had ethical prohibitions upon price competition by their individual members in the sale of A-E services (F. 45, *id.* at 1208). In 1972, two of these societies signed consent decrees which prohibit limitations on competitive bidding or the submission of price quotations by their members. *United States* v. *American Institute of Architects*, 1972 Trade Cas. ¶ 73,981 (D. D.C.); *United States* v. *American Society of Civil Engineers*, 1972 Trade Cas. ¶ 73,950 (S.D. N.Y.).

2. In December 1972, the United States filed a civil complaint alleging that Section 11(c) of NSPE's Code of Ethics and the enforcement thereof violated Section 1 of the Sherman Act. After a lengthy trial, the district court held that Section 11(c) constitutes a form of price fixing and is thus illegal *per se* because it "prohibits defendant's members from engaging in any form of price competition when offering their services" (*id.* at 1200). It has "as its purpose and effect the excision of price considerations from the competitive arena of engineering services" (*ibid.*).

[11] In addition to NSPE, the membership of COFPAES includes the American Institute of Architects, Consulting Engineers Council, American Institute of Consulting Engineers, American Society of Civil Engineers, and the American Road Builders Association—Engineering Division (F. 44, *id.* at 1208).

The court noted that, although Section 11(c) bars the disclosure of fee information, it permits the disclosure of the state society's recommended fee schedule, the undercutting of which is a violation of Section 9(b) of the Code (389 F. Supp. at 1200).[12] Thus "[t]he ban narrows competition to factors based on reputation, ability, and a fixed range of uniform prices" (*ibid.*). The court held that the prohibition against competitive bidding "is on its face a tampering with the price structure of engineering fees * * * an agreement to restrict the free play of market forces from determining price; to sacrifice freedom in pricing decisions to market stability," and thus *per se* illegal under Section 1 of the Sherman Act (*ibid.*). Finally, the court held that, although some states prohibit fee bidding by engineers, NSPE's price-fixing cannot be justified as required by state action since its Code, applicable nationwide, is merely a private agreement "formulated outside the command and supervision of a state agency" (*id.* at 1201).

On reconsideration of its decision, following remand by this Court (see p. 3, *supra*), the district court noted that "[i]n determining that the fee schedule in *Goldfarb* constituted a price fixing practice," this Court had emphasized "the nature of the restraint,

[12] The court stated that the legality of the fee schedules was not an issue in this case, but that "insofar as the use of fee schedules by defendant's members might affect the impact which Sec. 11(c) has on trade and commerce, an inquiry into their promotion and enforcement by defendant is plainly relevant" (*id.* at 1200, n. 3).

the enforcement mechanism, and the fee schedule's adverse impact upon consumers" (404 F. Supp. at 457, 460). Guided by this Court's analysis in *Goldfarb*, the district court reiterated its findings with respect to these three aspects of NSPE's ban on competitive bidding and held that "the combined character, enforcement, and effect of NSPE's bidding ban constitute a classic illustration of price fixing under *Goldfarb*" (*ibid.*).

The court held that, like the minimum fee schedule in *Goldfarb*, NSPE's bidding ban is "not an advisory measure," but rather, "an absolute prohibition on price competition among defendant's members," which they actively enforce and to which they uniformly adhere (*ibid.*). The court also emphasized that the ban "operates 'on its face [as] a tampering with the price structure of engineering fees' " which, "[s]ince engineering services are indispensable to almost any construction project and since alternative sources (*e.g.*, non-licensed professional engineers) are nonexistent," prevents the consumer from making "an informed, intelligent choice" (*ibid.*).[13]

In unanimously affirming, the court of appeals rejected NSPE's contention that its broad ban on competitive bidding was justified as necessary to avoid dangers to the public. The court held that it has been

[13] The court rejected as without merit the "defendant's contention that by awarding costs of $100 to NSPE, the Supreme Court held NSPE to be the *substantive* 'prevailing party' within the meaning of 28 U.S.C. § 2412." (*id.* at 459, n. 2.)

"both written and applied in practice as an absolute ban (affecting prices) that governs situations where there are no such dangers" (Pet. App. A-12), without regard to "the sophistication of the purchaser, the complexity of the project, or the procedure for evaluating price information" used by the purchaser (Pet. App. A-9). As such, the court held that it was fairly identified as a "price-sustaining mechanism" which "at its core 'tampers with the price structure' " and thus is *per se* unlawful (Pet. App. A-12).

The court approved the district court's decree except insofar as the decree required that NSPE publicly state that competitive bidding is not unethical (Pet. App. A-12-A-13). The court found that in light of the breadth of the competitive bidding ban and NSPE's "implacability" in enforcing it, "the district court was fully justified in granting * * * broad injunctive relief" (Pet. App. A-10).

The court held, however, that compelling NSPE to state judicially ordered ideas as its own opinion encroached on NSPE's First Amendment rights[14] (Pet. App. A-12). The court ruled that prohibiting NSPE from stating that competitive bidding is unethical and requiring it to publish a statement that its prior ruling has been rescinded in light of the court's decision, would satisfy the purposes of the Sherman Act. The case was remanded with instructions to modify the decree in this respect.

[14] The United States does not contest this holding.

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or any other court of appeals, and raises no issue warranting further review.

1. A. The court of appeals and the district court properly concluded that on this record, NSPE's comprehensive ban on competitive bidding operated to prevent price competition and as a consequence constituted a *per se* violation of the Sherman Act. There is no reason for this Court to consider further the factual determinations of the two courts below.

Section 11(c) of the NSPE Code tampers with the price structure of the engineering business in a fundamental way. As the district court found, it "prohibits defendant's members from engaging in any form of price competition when offering their services" (389 F. Supp. at 1200), and though it does not set prices at a specific uniform level,[15] it restricts "the free play of market forces from determining price" and "sacrifice[s] freedom in pricing decisions to market stability" (*ibid.*). These findings, which NSPE does not challenge here, are dispositive. *United States* v. *General Dynamics Corp.*, 415 U.S. 486, 508. As the court of appeals correctly observed: "the absolute rule is fairly identified as a price-sustaining mecha-

[15] As indicated *supra*, n. 6, another provision of the NSPE Code, Section 9(b), deters members from undercutting the state or local society's list of suggested prices (389 F. Supp. at 1200).

nism * * * that at its core 'tampers with the price structure,' and * * * [is] therefore illegal without regard to claimed or possible benefits" (Pet. App. A-12; footnote omitted).[16]

Petitioner's contention (Pet. 15-17) that the lower courts here refused to consider the evidence and examine Section 11(c)'s ban on competitive bidding in

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[16] Combinations or conspiracies among competing sellers to fix prices or otherwise tamper with the price structure of the markets in which they sell have long been condemned as so damaging to competition that no alleged justification for their existence will be considered by a court; they are unreasonable restraints as a matter of law. *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485, 489; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 218-228; *United States* v. *Trenton Potteries Co.*, 273 U.S. 392. Price is the "central nervous system of the economy" and any agreement among competitors that tampers with the price structure is unlawful *per se*, *United States* v. *Socony-Vacuum Oil Co.*, *supra*, 310 U.S. at 226, n. 59. Pleas that the restraint is reasonable or necessary to protect the public are not considered. *United States* v. *National Association of Real Estate Boards*, *supra*; *Fashion Originators' Guild of America* v. *Federal Trade Commission*, 312 U.S. 457, 467-468; *United States* v. *Socony-Vacuum Oil Co.*, *supra*, 310 U.S. at 220-222.

The offense of price fixing encompasses more than just an agreement to fix prices at specific levels. It covers agreements to raise, depress, fix, peg or stabilize prices as well. *United States* v. *Socony-Vacuum Oil Co.*, *supra*, 310 U.S. at 221-223; *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211; cf. *United States* v. *Container Corp. of America*, 393 U.S. 333. It is the act of tampering with price competition which is the essence of the offense. "The [Sherman] Act places all such schemes beyond the pale and protects that vital part of our economy [*i.e.* price competition] against any degree of interference." *United States* v. *Socony-Vacuum Oil Co.*, *supra*, 310 U.S. at 221.

the context of its purpose and effect is incorrect. The court of appeals expressly found that the district court had "assessed the rule by taking into account how it had operated in fact, and with what practical anticompetitive consequences" (Pet. App. A-7 - A-8). The district court made detailed findings concerning the nature and operation of NSPE's bidding ban within the context of engineering practices, and concluded that NSPE and its members actively policed adherence to the ban with the intent and effect of eliminating price considerations as a competitive factor in the field of engineering services. 389 F. Supp. at 1196, 1200.[17]

On remand from this Court, the district court recognized and applied the factors the Court emphasized in *Goldfarb*: the nature of the restraint, the enforcement mechanism, and the restraint's adverse impact upon consumers. It found that Section 11(c) was an "absolute prohibition on price competition," rather than merely an advisory measure, which was actively enforced through a variety of mechanisms with the result that consumers were "prevented from making an informed, intelligent choice" in selecting engineering services. 404 F. Supp. at 460. On this basis, the district court found that "the combined character, enforcement and effect of NSPE's bidding ban constitute a classic illustration of price fixing under *Goldfarb*" and adhered to its previous determination

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[17] The district court's findings are summarized at pp. 9-11, *supra*.

that Section 11(c) is illegal *per se*. 404 F. Supp. at 460-461. The court of appeals agreed (Pet. App. A-5 - A-12).

The courts below properly rejected petitioner's claim that Section 11(c) is necessary to preserve public safety (Pet. 8, 10, 22). However, those courts did

> not say or imply that there is no room in antitrust law for ethical rules of practice for the learned professions, to prevent harm to the lay consumer and general public. What we do say is that the rationalization offered by the Society does not justify the broad ban on all competitive bidding which the Society has attempted to enforce [Pet. App. A-8 - A-9].

The courts below thus recognized that antitrust law is flexible enough to allow professional self-regulatory conduct that is designed primarily to protect the public and is no more restrictive than necessary. They nevertheless correctly concluded, on the basis of the district court's findings of fact, that Section 11(c) was neither drafted nor enforced for the principal purpose of protecting public safety.

Thus, the court of appeals noted that NSPE's ban on competitive bidding "has been stolidly applied as a block governing any and all engineering services associated with the study, design, and construction of real property improvements. It does not take into account the sophistication of the purchaser, the complexity of the project, or the procedures for evaluating price information" (Pet. App. A-9). It concluded

that Section 11(c) "is a rule that is sought to be justified in terms of avoiding dangers to society, but which has been both written and applied in practice as an absolute ban (affecting prices) that governs situations where there are no such dangers" (Pet. App. A-12).

In sum, the lower courts' rejection of petitioner's safety justification for the rule was based upon a correct statement of the law and upon findings of fact which the record amply supports.

B. Petitioner contends (Pet. 16), citing a footnote in *Goldfarb* v. *Virginia State Bar*, *supra*, 421 U.S. at 788-789, n. 17,[18] that private agreements among "professionals" to reduce price competition between themselves are not subject to the traditional *per se* rule against price fixing, and should be assessed by the rule of reason. It is mistaken.

The district court in *Goldfarb* held that defendants' fee schedules were a form of price-fixing and hence

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[18] This footnote states:

> The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today.

illegal *per se*. 355 F. Supp. 491, 493-494 (E.D. Va.). This Court affirmed that finding, concluding that "respondents' activities constitute a classic illustration of price fixing." 421 U.S. at 783. The Court did not evaluate the restraint under the rule of reason or instruct the district court to make such an evaluation on remand, despite arguments by the defendants in *Goldfarb*, like those of NSPE here, that the restraint was necessary to prevent cost cutting that would result in "cheap, though faulty" professional work and therefore should be judged under a rule of reason analysis.[19]

The *Goldfarb* footnote[20] simply reserves judgment on the proper analysis of competitive restraints, other than price fixing, by professionals. The reference to the "public service aspect" of the professions does not intimate that attempts by professionals to eliminate price competition is to be treated differently from such attempts by others.

C. Petitioner also contends (Pet. 26-28) that the previous action of this Court (422 U.S. 1031), va-

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[19] See, *e.g.*, *Goldfarb* v. *Virginia State Bar*, *supra*, Brief For Respondent Fairfax County Bar Association, pp. 34, 53-55; Brief on Behalf of Respondent Virginia State Bar, p. 16.

[20] The fact that footnote 17 appears in the portion of the *Goldfarb* decision which considered the question of whether the "professions" were exempt from the antitrust laws rather than in the portion of the decision in which attorney price fixing was found to be a "classic" Section 1 violation supports the conclusion that *Goldfarb* does not require a special legal rule for price fixing by professionals.

cating the judgment of the district court and remanding the case for reconsideration in light of *Goldfarb* v. *Virginia State Bar*, *supra*, required reconsideration of the Society's restriction under the rule of reason. This assertion, which amounts to a claim that this Court reversed on the merits, was correctly rejected by the courts below (Pet. App. A-8; 404 F. Supp. at 459 n. 2), and is nothing more than a reformulation of petitioner's contention, refuted above (pp. 17-18), that under *Goldfarb* its price-fixing activities are to be tested under the rule of reason (Compare Pet. 16-17, with Pet. 27).

As shown above (pp. 15-16), the district court on remand, as well as the court of appeals, carefully reconsidered the case in the light of *Goldfarb*. See Pet. App. A-7 - A-12; 404 F. Supp. at 459-461. A lower court's adherence to its previous decision following remand by this Court for reconsideration in light of a significant intervening precedent is neither unusual nor erroneous. See, *e.g.*, *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 379-380 (vacating and remanding the decision below, in part, for reconsideration in light of *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508); on remand, *United States* v. *Otter Tail Power Co.*, 360 F. Supp. 451 (D. Minn.) (previous findings and conclusions adhered to after consideration of *Trucking Unlimited*); affirmed *per curiam*, 417 U.S. 901.

On the basis of the district court's findings as to the broad nature of the restraint, the court of appeals correctly held that cases permitting, in other

limited contexts, narrowly defined restrictions that may potentially affect price (*e.g.*, *Chicago Board of Trade* v. *United States*, 246 U.S. 231) were inapplicable here (Pet. App. A-11). The district court twice carefully considered and analyzed the purpose and effect of NSPE's proscription of price competition in terms of its actual operation and practical competitive impact, and the court of appeals, after a comprehensive analysis, agreed. The assessments of these courts fully meet the standards enunciated in *Goldfarb* and do not raise issues warranting further review.

D. Petitioner also asserts that because various governmental bodies have decided not to rely on competitive bidding for procurement of engineering services, NSPE's ban on competitive bidding is "reasonable as a matter of law" (Pet. 17-20). This assertion reflects a fundamental misconception concerning the Sherman Act's prohibition against agreements in restraint of trade. Individual purchasers may choose to forego competitive bidding. Under the Sherman Act, however, sellers, may not, by collective agreement, deprive purchasers of competitive options. Thus, while local authorities, state officials and the Congress may eschew competitive bidding in specified circumstances, such decisions neither authorize nor command nationwide imposition of these policies by private agreement. *United States* v. *Socony-Vacuum Oil Co., supra.*[21]

[21] This Court specifically rejected arguments similar to NSPE's in *United States* v. *Socony-Vacuum Oil Co., supra.* In

E. Contrary to petitioner's claim (Pet. 20-22), the decision below does not conflict with decisions of other circuits. The cases petitioner cites involve refusal to extend the *per se* rule, *i.e.*, to apply it to a practice for the first time or to practices that this Court has ruled should be judged under the rule of reason.[22]

that case, price fixing was held to constitute a *per se* violation of Section 1 of the Sherman Act despite "[t]he fact that the buying programs [involving the price fixing] may have been consistent with the general objectives and ends sought to be obtained under the National Industrial Recovery Act * * *." *United States* v. *Socony-Vacuum Oil Co., supra,* 310 U.S. at 227-228. The Court held that only "specific Congressional authority," which the program lacked could save it from *per se* illegality. *Id.* at 226 and see 225-227. Section 11(c) has no such "specific Congressional authority."

While the Brooks Act (40 U.S.C. (Supp. II) 541-544), relied on by petitioner (Pet. 17-20), does not require competitive price bidding on certain federal procurements of engineering services, Congress made it clear that enactment of this legislation would not "limit the operations of the Department of Justice in the application of our antitrust laws." H.R. Rep. No. 92-1188, 92d Cong., 2d Sess. 6 (1972).

[22] In *Evans* v. *S.S. Kresge Co.*, 544 F. 2d 1184 (C.A. 3), and *Moraine Products* v. *ICI America, Inc.*, 538 F.2d 134 (C.A. 7), certiorari denied, No. 76-391, November 8, 1976, the courts applied the rule of reason to antitrust claims based on restrictive provisions in trade name and patent licenses, respectively. Each court found that it was confronted with a matter of first impression and, on that basis, declined to apply the *per se* doctrine. 544 F.2d at 1192; 538 F.2d at 138. In *Evans* v. *S.S. Kresge Co., supra,* the court also found that the parties were not competitors. In *Kentucky Fried Chicken Corp.* v. *Diversified Packaging Corp.*, 549 F.2d 368 (C.A. 5), the court found, contrary to petitioner's description of the case (Pet. 21), that no tying arrangement existed. 549 F.2d at 376-378. Only after reaching that conclusion did the court decline "to

None of the cases involved an attempt by competitors directly to eliminate price competition, a practice traditionally condemned as *per se* illegal.

2. Petitioner's claim that portions of the district court judgment, even as modified by the court of appeals, violate the First Amendment (Pet. 23-25) is insubstantial.[23] The decree [24] properly reflects and implements the district court's findings that NSPE had secured adherence to the illegal agreement by extensive publicity among its members concerning the supposedly unethical nature of price competition.

The gravamen of the violation involved neither political nor commercial speech. NSPE was not simply articulating views on social policy in the hope of persuading its members independently to decide, free from the fear of sanction, to refrain from competitive price bidding. NSPE here promulgated and enforced an "ethical" rule which coerced members to avoid price competition. An injunction against such conduct infringes no First Amendment rights, for as this Court has held (*Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502):

> * * * [I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. * * * Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society.

See also *Los Angeles Meat & Provision Drivers Union* v. *United States*, 371 U.S. 94, 101 n. 5.

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add approved-source requirements to the list of *per se* violations." 549 F.2d at 379. *Mackey* v. *National Football League*, 543 F.2d 606 (C.A. 8) and *Hatley* v. *American Quarter Horse Ass'n*, 552 F.2d 646 (C.A. 5) involved situations in which the courts refused to apply a standard of *per se* illegality to rules on player transfers and quarter horse registration requirements because of the necessarily interdependent relationship between the competitors involved. 543 F.2d at 619; 552 F.2d at 652.

Quality Mercury, Inc. v. *Ford Motor Co.*, 542 F.2d 466 (C.A. 8), involved a vertical territorial restriction, subject to a rule-of-reason analysis under this Court's recent decision in *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, No. 76-15, decided June 23, 1977. *Response of Carolina, Inc.* v. *Leasco Response, Inc.*, 537 F.2d 1307 (C.A. 5), also involved vertical territorial restrictions, as well as an alleged tie-in which the court found the evidence did not establish.

[23] Petitioner never made its First Amendment argument to the district court, although it had ample opportunity to do so. At oral argument on November 7, 1975, it stated in passing that it wanted a hearing "on the form and content of the decree" (Tr. 51). Although the district court did not decline to hold such a hearing, petitioner never followed up the matter, either in the ensuing three weeks leading to entry of judgment, or thereafter.

[24] The judgment of the district court is reproduced at Pet. App. A-15 - A-20. The portion of the opinion of the court of appeals modifying the decree is set forth at Pet. App. A-12 - A-13. The United States does not contest this modification. The judgment has not yet been amended to reflect the modification the court of appeals ordered.

Paragraph VII of the judgment (Pet. App. A-17), of which petitioner specifically complains (Pet. 23), does no more than is necessary to prevent a recurrence of petitioner's numerous and widespread activities which publicized and enforced its illegal agreement. *United States* v. *Gypsum Co.*, 340 U.S. 76, 88-89. It bars NSPE from adopting or disseminating a rule or guideline which prohibits or discourages members from submitting price quotations for engineering services or states that such price competition is improper. It is in accord with decisions of this Court holding that an injunction in an antitrust judgment may place restraints on expression or association in order to prevent repetition of Sherman Act violations. *California Motor Transport* v. *Trucking Unlimited*, 404 U.S. 508, 514; *United States* v. *Otter Tail Power Co.*, 360 F. Supp. 451 (D. Minn.), affirmed *per curiam*, 417 U.S. 901.[25]

The other portion of the judgment challenged (Pet. 24), Paragraph VIII (Pet. App. A-17 - A-18), requires appellant to publicize the judgment, by printing and distributing copies to old and new members and, as modified by the court of appeals, by publishing "an advice that its prior ruling has been rescinded in light of the court's decree" (Pet. App. A-13). This Court has upheld such a publication requirement.

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[25] See also: *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226; *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 616-618; *Associated Press* v. *United States*, 326 U.S. 1, 19-20; *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376.

Lorain Journal Co. v. *United States*, 342 U.S. 143, 155-158.[26]

Petitioner's argument (Pet. 24) that the judgment contravenes rights assured by *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 and *United Mine Workers of America* v. *Pennington*, 381 U.S. 657, is also wide of the mark. *Noerr* and *Pennington* establish that the antitrust laws do not prohibit appeals to a governmental body designed to engender anticompetitive governmental action. No part of the allegations or proof in this case, however, involves attempts by NSPE to influence the official action of a governmental body. And nothing in the judgment prevents NSPE from so doing.[27] NSPE and its members may communicate their views to state or federal officials and attempt to influence those officials to act in particular ways.

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[26] The decree upheld by the Court in that case contained the following provision (342 U.S. at 158):

> Commencing fifteen (15) days after the entry of this judgment and at least once a week for a period of twenty-five weeks thereafter the corporate defendant shall insert in the newspaper published by it a notice which shall fairly and fully apprise the readers thereof of the substantive terms of this judgment and which notice shall be placed in a conspicuous location.

[27] Indeed, the only mention in the judgment of government officials is Paragraph VIII's requirement that NSPE send copies of the judgment "to each State Board of Engineering Registration in the United States" (Pet. App. A-17).

The decree is a carefully shaped remedial measure designed effectively to redress the antitrust violation found and to prevent future violations. As the court of appeals said, "[t]he case as it stands presents a Society whose program had been one of all-out interdiction of price information for the client who has not selected its engineer, and this warrants a firm remedial decree" (Pet. App. A-10). A judgment that did not accomplish complete termination of the violation and prevention of its renewal would have been inadequate. *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 323-325; *International Salt Co.* v. *United States*, 332 U.S. 392, 400-401; see also *United States* v. *Gypsum Co., supra*, 340 U.S. at 88-89.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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